

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 20, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1981-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN KOBRIGER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha County: DAVID WILLIS and MARIANNE BECKER, Judges.
Affirmed.

SNYDER, J. Kevin Kobriger appeals from a judgment convicting him of operating a motor vehicle while under the influence of intoxicants (OWI) contrary to § 346.63(1)(a), STATS.,¹ and an order denying postconviction relief. On appeal, Kobriger seeks to have his conviction

¹ The companion charge of having a prohibited alcohol concentration contrary to § 346.63(1)(b), STATS., was dismissed.

reversed. He argues that the trial court's refusal to dismiss his case was erroneous as a matter of law or, in the alternative, that the evidence was insufficient to support the jury verdict. As a second basis for contesting his conviction, Kobriger argues that under the circumstances it was not possible for him to operate the vehicle. We conclude that the evidence was sufficient to show that Kobriger operated a motor vehicle while under the influence of intoxicants. Consequently, we affirm.

This case arose out of an accident which occurred in the parking lot of the apartment complex where Kobriger's girlfriend, Peggy Ronkowski, lived. At approximately 11:00 p.m., Daniel Hoenisch, the manager of the complex, heard a crash in the parking lot and went outside to investigate. When he reached the scene, Hoenisch saw a blue truck with its bumper locked to a parked station wagon.

When Hoenisch first saw the truck, it was “[r]ocking, trying to get loose from the bumper.” As Hoenisch came closer, the truck stopped moving. Hoenisch identified the driver as Kobriger. Hoenisch tried to get Kobriger's attention by tapping on the window of the truck, but he did not respond.² Hoenisch then returned to his apartment and called the police.

² Hoenisch testified as to Kobriger's condition when he approached the truck:

At first I thought he was passed out. When I got down to the window he is--he was sitting sort of half slumped over, eyes were open, but he was not-- didn't look like he was aware of what was going on, didn't look over at me. Just sort of staring forward.

When Officers Cynthia Sohar and John Ward arrived, Kobriger was still in the truck, attempting to unhook its bumper from the station wagon. Sohar testified that she observed Kobriger “trying to put [the truck] into reverse” and that it “would lurch forward at times.” Sohar further testified that upon questioning Kobriger about the circumstances, he gave her at least three conflicting accounts of how the accident had occurred.

In one of those accounts, Kobriger stated that he had caused the accident. At the same time, Ward interviewed Ronkowski, who had come from the apartment building when the police arrived. She stated that she was the one who had originally hit the station wagon with the truck. Both Kobriger and Ronkowski were taken into custody for operating a motor vehicle while under the influence of intoxicants.³ Kobriger agreed to a blood test and was found to have a BAC of .303%. He was convicted of operating a motor vehicle while intoxicated, and this appeal followed.

On appeal, Kobriger argues that the trial court's refusal to dismiss his case was erroneous as a matter of law or, in the alternative, that the evidence was insufficient to support the jury verdict. For both contentions he relies on a theory that it was impossible for him to be convicted of an OWI violation when Ronkowski had already been convicted of this while operating the same vehicle at the same time. As an alternate basis to contest his conviction, he claims that he should not have been found guilty of the OWI violation since the truck was immovable, precluding its operation. We address these issues in turn.

³ Ronkowski was cited and fined for an OWI violation stemming from the same incident.

Our review of the first issue requires this court to examine the sufficiency of the evidence supporting Kobriger's conviction. In deciding the question of whether a jury verdict was based on sufficient evidence, an appellate court may not overturn the conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). If more than one reasonable inference can be drawn from the evidence, the reviewing court must adopt the inference which supports the conviction. *State v. Hamilton*, 120 Wis.2d 532, 541, 356 N.W.2d 169, 173-74 (1984).

Kobriger argues that he should not have been convicted of the OWI violation as "both [he] and his girlfriend could not physically have been driving the same car at the same place at the exact same minute." Kobriger's argument is based on the assumption that only one person could have driven the truck to the lot and crashed it into the parked car. Since Ronkowski had already taken responsibility for doing this, it was impossible for him to be convicted of the same offense.

Kobriger wrongly assumes that his conviction arose out of the act of driving the truck to the parking lot and hitting the parked car. However, the trial court correctly observed:

The Court will take it that [it] could happen in a situation where the person that said they admitted they drove the vehicle into the parking lot, was found guilty for driving it in, and this person is charged with

operating it after the accident when he was operating
it according to the charge

Based on our review of the record, we conclude that the jury was presented with sufficient evidence that Kobriger was behind the wheel of the truck, attempting to move it, while in an intoxicated condition.

Kobriger next contends that his conviction should be reversed because it was impossible for him to “operate” the truck, as its bumper was locked to the parked car. This issue involves a question of statutory interpretation. In construing a statute the primary source is the language itself. *County of Milwaukee v. Proegler*, 95 Wis.2d 614, 625, 291 N.W.2d 608, 613 (Ct. App. 1980). If the meaning of a statute is clear, it is improper to employ extrinsic aids. *State v. Annala*, 168 Wis.2d 453, 461, 484 N.W.2d 138, 141 (1992).

Section 346.63(3)(b), STATS., defines the operation of a motor vehicle as “the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.” The statute contains no requirement that the vehicle be able to move; “operating” requires only the manipulation of its controls. In *Proegler*, 95 Wis.2d at 626, 291 N.W.2d at 613, this court stated, “One who enters a vehicle while intoxicated, and does nothing more than start the engine is as much of a threat to himself and the public as one who actually drives while intoxicated. The hazard always exists that the car may be caused to move accidentally, or that the one who starts the car may decide to drive it.”

Kobriger argues that because it required a tow truck to separate the two vehicles, his attempts to disengage his truck from the parked car did not meet the definition of “operate.” We disagree. Kobriger obviously did not know that it was impossible or he would not have attempted it. Sohar saw Kobriger attempt to put the truck into reverse and stated that the truck would “lurch forward at times.” Both Sohar and Hoenisch testified that Kobriger was in the driver's seat with the engine running. As stated in *Proegler*, the prohibition against activation “applies either to turning on the ignition or leaving the motor running while the vehicle is in ‘park.’” *Id.*

We conclude on review that there was sufficient evidence presented to support Kobriger's conviction and that he did operate the truck within the meaning of the statute.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.